Committee on House Administration
Subcommittee on Elections

Oversight Hearing on the Use of "Robocalls" in Federal Campaigns

Testimony of John F. Cooney
Partner, Venable LLP

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Chairman Lofgren and members of the Subcommittee, thank you for the invitation to testify concerning the use of prerecorded telephone calls in federal election campaigns. My name is John F. Cooney, and I am a partner in the law firm of Venable LLP in Washington, D.C.

In my testimony, I will focus on the First Amendment issues related to use of prerecorded calls as a form of political communication in election campaigns. Bills have been filed and are being considered by the House of Representatives that would establish additional regulatory requirements on prerecorded political calls beyond those already imposed on such calls by the governing rule of the Federal Communications Commission, pursuant to a grant of authority by Congress in the Telephone Consumer Protection Act of 1991.

Prerecorded telephone calls in political campaigns are a form of political speech that are entitled to the greatest degree of protection available under the First Amendment. Supreme Court decisions applying the First Amendment to political communications establish an exacting standard of review. A law can survive constitutional scrutiny only if it serves a compelling governmental interest and is the least restrictive alternative necessary to serve that interest. *See Buckley v. Valeo*, 425 U.S. 1, 45 (1976). In considering legislation that would restrict prerecorded political communications, the

Members of the Subcommittee should proceed carefully to avoid infringing the First Amendment rights of both speakers and recipients.

I. Prerecorded Political Calls.

Prerecorded telephone calls have long been used in federal elections to help survey potential voters about their attitudes and to persuade voters to go to the polls on election day. The term "robo-calls" might have been an accurate description in the infancy of prerecorded calls in the late 1980s and early 1990s, when the technology allowed the political speaker to do little more than attach a tape player to a telephone and play a recorded message from beginning to end. The term bears no resemblance to the current generation of technology, which employs interactive voice response, speech recognition software. This technology can be programmed in many ways to ask a recipient any question that a human might present and can respond to "Yes or No" answers from the recipient, by choosing among various alternative questions that could be asked next. The technology also can be programmed to disconnect the call at the request of the recipient.

Today's interactive voice response, speech recognition technology would more accurately be described as "Artificial Intelligence calls." The calls can be made to sound like a live person, rather than a machine; the systems can change from English to Spanish when a response is received in Spanish. Data generated from the responses can be accumulated more quickly, without any time lag bias. All questions are asked in the same voice, which eliminates the risk of "surveyor bias" or adjustments that need to be made for accents.

The technology for making automated calls has progressed to the point that the interactive voice response, speech recognition technology systems of our client ccAdvertising are an approved part of the Franking process of the U.S. House of Representatives. Those systems are used to by various Members to conduct franking surveys of their constituents.

II. First Amendment Principles Applicable to Prerecorded Political Calls.

A. Background Principles. The Supreme Court has long recognized the critical importance of free political communication in election contests. For example, in *Eu v. San Francisco Cty. Democratic Cent. Com*, 489 U.S. 214 (1989), the Court held that "[t]he First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office.'" 489 U.S. at 23, quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Similarly in *Meyer v. Grant*, 486 U.S. 414 (1988), the Court found that political speech is "at the core of our electoral process and of the First Amendment freedoms . . . an area of public policy where protection of robust discussion is at its zenith." 486 U.S. at 425 (internal citations omitted).

Further, the First Amendment "protects [the speaker's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424. In that case, the Supreme Court found that a Colorado law prohibiting the use of paid petition circulators "restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse" and therefore constituted an impermissible burden on speech, especially given the presence of less restrictive alternatives that could address the State's concerns. *Id*. The Court explicitly relied on these cost and efficiency considerations in determining that the statute imposed

an unconstitutional burden on political speech. In so holding, the Court reaffirmed its prior decision in *Martin v. City of Struthers*, 319 U.S. 141 (1943). There, the Court invalidated an ordinance prohibiting door-to-door solicitation even for religious purposes, based in part on the fact that such speech "is essential to the poorly financed causes of little people." 319 U.S. at 146.

The Supreme Court has held repeatedly that laws which ban an entire category of protected expression are unconstitutional. In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court followed five prior decision in which it had held that laws which "foreclose an entire medium of expression" violate the First Amendment. 512 U.S. at 47.

> Although prohibitions foreclosing entire media may be *completely free of content or viewpoint discrimination*, the danger they pose to the freedom of speech is readily apparent -- by eliminating a common means of speaking, such measures can suppress too much speech.

Id. (emphasis added).

Similarly, the Supreme Court has held that the government may not categorically prohibit an entire category of protected speech based on a false and undocumented assumption that all residents object to that particular form of speech and are unwilling to receive it. In *Struthers*, the Court struck down a local law imposing a total ban on door-to-door communication of highly protected speech on the ground that:

> The ordinance . . . substitutes the judgment of the community for the judgment of the individual householder. It submits the distributer to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it.

319 U.S. at 143-44.

Congress followed these core First Amendment principles in enacting the Telephone Consumer Protection Act of 1991. The statute established a comprehensive regime for regulating, and in many respects prohibiting, prerecorded calls made for commercial purposes. Congress, however, recognized that speech made for non-commercial purposes was entitled to a greater degree of protection under the Constitution than commercial speech and therefore did not prohibit prerecorded calls for these purposes. Rather, Congress delegated authority to the Federal Communications Commission to determine, through rulemaking, whether prerecorded speech for non-commercial purposes should be exempted from the general prohibition on prerecorded calls and, if so, under what conditions. 47 U.S.C. § 227(b)(2)(B). In 1992, in recognition of the heightened constitutional protection to which political speech is entitled, the FCC determined that prerecorded political communications were permissible. 7 FCC Rcd 8752 (1992).

In 2003, the FCC expressly stated that "any state regulation of interstate telemarketing calls that differs from our rules *almost* certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." 18 FCC Rcd 14014 ¶84 (2003) (emphasis added). There is ongoing litigation in the State courts of Indiana concerning the constitutionality of its law that prohibits virtually all prerecorded calls, even if made for political speech purposes and even if interstate in nature.

B. Application of These Principles to Restrictions on Prerecorded Political Calls.

Under the Supreme Court's decisions, prerecorded political calls – that is, communications intended to determine the recipient's political views and to persuade that

person to vote – constitute core political speech and are entitled to the greatest degree of protection afforded by the First Amendment. Under the so-called strict scrutiny test, a government seeking to restrict core political speech must demonstrate that its law serves a compelling interest and is the least restrictive alternative available to serve that interest. The courts have recognized that protecting residential privacy is a compelling state interest. But under repeated Supreme Court decisions, a law prohibiting prerecorded political calls, either explicitly or in a de facto manner based on its effects, violates the First Amendment.

First, the Supreme Court has explicitly held that a law prohibiting an entire medium of communication of protected speech violates the First Amendment. *See City of Ladue*, 512 U.S. at 47, citing five prior cases on which it relied. The Court's decisions also establish that a government cannot prohibit all political speech to potential voters based on an unfounded assumption that since some recipients may object to a particular form of political speech, all potential recipients are unwilling to received it. *City of Struthers*, 319 U.S. at 143-44.

In prior litigation over the constitutionality of the Indiana law prohibiting prerecorded political calls filed against the State by FreeEats.com, the undisputed facts in the record of the U.S. District Court for the Southern District of Indiana demonstrated that 40% of the homes that actually answered the telephone in response to a call made by its interactive voice response, speech recognition technology responded to at least some of the interactive political survey questions they were asked; 20% of the live recipients completed the entire survey. In the face of this evidence, it would be unconstitutional for a government to ban an entire category of speech based on complaints by some residents

that they do not wish to receive prerecorded political calls. Under the Supreme Court's decisions, the controlling factor is that a substantial proportion of the population wishes to receive prerecorded political calls, as demonstrated not by an abstract response to a pollster's question but by their actual behavior when they received such calls.

Second, under the least restrictive alternative test, a law banning prerecorded political speech with potential voters is unconstitutional where other approaches or technologies are available that permit fine tuning distinctions between the potential recipients who do or do not wish to receive a particular call. In this regard, it is important that the technology by which prerecorded calls are made has evolved substantially since the first generation of laws were passed concerning such calls twenty years ago. Today, prerecorded calls can be made with technology that responds to voice commands given in a "Yes or No" format and that tailors its subsequent actions to the expressed preferences of the recipient. For example, the technology could be programmed to begin a prerecorded political call with an introductory section that seeks, through a simple “Yes or No” response, the recipient’s permission before playing the substantive political polling survey or message. In the event that the recipient gives a "No" response, the software could be programmed to disconnect the call. The interactive technology also could utilize a subsequent "Yes or No" response to offer the recipient the option to have his name added to a speaker-specific do-not-call list.

In applying the least restrictive analysis standard, it is important to note that several jurisdictions, including Indiana, prohibit all prerecorded calls, whether for commercial or political purposes, but contain an exception that permits such calls if they are introduced by a live operator who solicits the recipient’s consent for the prerecorded

portion of the call. However, modern interactive voice response, speech recognition technology can be programmed to ask at the outset of the call for the recipient's consent to play the prerecorded substantive portion of the call, in exactly the same words that an operator reading from a script would use, and to disconnect the call if the recipient answered "No."

The effect on residential privacy in having these questions asked by a prerecorded, interactive call is no different from the effect of having these calls asked by a live operator, and the answers taken in response to the recipient's answer would be the same. A statute that required the speaker to include such interactive features at the beginning of a prerecorded political call would thus permit precise differentiation of which recipients wish to receive that political message, without the suppression of political speech that would be imposed by the costs of a requirement that a live operator deliver the same message.

The undisputed facts in the record of the Indiana District Court proceeding also show that the requirement of a live operator to deliver the introductory message seeking consent to play the prerecorded portion of the call would increase by 1500% the cost of calling the same population and delivering the same message through a prerecorded introduction. This vast cost increase would function as a *de facto* prohibition or severe curtailment of political speech through prerecorded calls. Moreover, the evidence in that proceeding showed that the delays in communication caused by the live operator requirement would make it physically impossible for a political speaker to reach many voters in the days immediately before an election.

Meyer v. Grant establishes that these cost and delay considerations are of critical significance in determining the constitutional validity of a government restriction on political speech. They formed the basis for the Supreme Court's conclusion that the statute there at issue constituted an impermissible burden on political speech because it restricted "access to the most effective, fundamental, and perhaps economical avenue of political discourse." 486 U.S. at 424. The Court also has found that a law prohibiting protected speech may be unconstitutional even it is not framed as an explicit ban, but nonetheless accomplishes the same result through the size of the imposition that is imposed on that speech. "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000).

Accordingly, based on currently available technology, a statute that imposed a categorical ban on prerecorded political speech would be unconstitutional. There is an effective and less restrictive alternative available to a prohibition, which is to permit such calls to be made with interactive voice response, speech recognition technology that permits an individualized determination for that specific call of whether a particular recipient does or does not wish to receive the prerecorded message. The existence of such an alternative means that a blanket prohibition would fail the strict scrutiny test, because it is not the "least restrictive" approach available.

Some of the bills that have been filed and are being considered by the House of Representatives would authorize creation of a national Political "Do-Not-Call" list that would permit voters to register to block receipt of any future prerecorded political calls,

regardless of the identify of the speaker or the political cause he or she represents. I am unaware of any jurisdiction that has created such a Political "Do Not Call" list. There certainly has been no litigation directly considering the constitutionality of such an approach; all cases decided to date involving Do-Not-Call lists involve their use to prevent transmission of prerecorded commercial messages. This type of speech is entitled to a lesser degree of protection under the First Amendment than the political communications that the current bills address.

Based on the Supreme Court decisions set forth above, there are substantial reasons to believe that a statute seeking to establish a Political "Do Not Call" list would be held to violate the First Amendment. Such a list would irrevocably inhibit the ability of political speakers to communicate with a portion of the electorate through an effective form of communication and would deprive the political speaker of the fundamental right to ask whether a voter wished to receive a message. As discussed above, the intrusion on residential privacy by asking such a question, at the outset of a prerecorded cal, through the capabilities of interactive voice response, speech recognition technology is no different from the degree of intrusion that would occur when a live operator places such a call and makes such a request.

The importance of the difference between commercial and non-commercial speech in the context of telephone calls is demonstrated by the Seventh Circuit's recent decision in *National Coalition of Prayer v. Carter*, 455 F.3d 783 (7th Cir. 2006), in which one of today's witnesses, Indiana Attorney General Steve Carter, was the defendant. There, the court upheld, against a First Amendment challenge, the constitutionality of a provision of the Indiana Telephone Privacy Act which precluded

charities from making fundraising calls through professional marketers and required that such sales calls could be made only by volunteers or employees of the charity. 455 F.3d at 784. In upholding the restriction as applied to this form of commercial speech, the court stated on three occasions that "an act that severely impinged on core First Amendment values might not survive constitutional scrutiny." *Id*. at 790 n.3. The court based its decision on the fact that the Attorney General had by his own interpretation carved out an exception to the statute so that this restriction did not apply to political speech. The court stated:

> [W]e are mindful that if an ordinance is to regulate any speech, it must be able to withstand a First Amendment challenge. To that end, it is not surprising that the Indiana Attorney General has fashioned an "implicit exception" for political speech, even if that speech comes from professional telemarketers. Political speech has long been considered the touchstone of First Amendment protection in Supreme Court jurisprudence, and courts are prone to strike down legislation that attempts to regulate it.

Id. at 791.

For these reasons, the Subcommittee should act with great care in considering any proposal, such as a Political "Do Not Call" list, that would ignore the differences between the application of the First Amendment in the political and commercial contexts and that would purport to prevent political speakers from contacting voters in connection with an election.

C. Regulation of Political Calls through Time, Place or Manner Restrictions.

A State law may impose reasonable restrictions on speech based on its time, place or manner, provided that the restrictions are justified without reference to the content of the speech, they are narrowly tailored to serve a significant government interest, and they

leave open ample alternative channels for communication of the information. *See Ward v. Rock against Racism,* 491 U.S. 781, 791 (1989).

Under this "intermediate scrutiny" test, some restrictions on the ability of speakers to make prerecorded political calls might be permissible. The FCC rules regulating political speech already contain a substantial number of such restrictions, such as the hours of the day when prerecorded non-commercial calls may be made. These conditions were carefully designed to respect the heightened First Amendment protection to which political speech is entitled. There likely would be no constitutional objection if Congress were to codify the "time, place or manner" restrictions that the FCC has adopted. However, to the extent that pending bills propose restrictions under the "time, place or manner" rationale that go beyond the scope of the FCC rules, the Subcommittee should review those proposals carefully to make certain that the additional restrictions do in reality simply shift the time, place or manner of delivery of a political message, and do not constitute a disguised attempt to restrict of the ability of political speakers to communicate with residents or the volume of those communications.

The Subcommittee should be aware that under the First Amendment, any additional restriction imposed on political speech pursuant to the "time, place or manner" rationale would have to apply to other forms of non-commercial speech to at least the same extent. As noted, political speech is entitled to the highest degree of protection available under the First Amendment. Therefore, it would be unconstitutional for Congress to adopt a "time, place or manner" restriction on prerecorded political communications, while purporting to exempt prerecorded similar speech by the Red Cross or a charitable organization from such a restriction. The Subcommittee should bear

this practical consequence in mind if it considers any new restrictions under this rationale.

Finally, the Subcommittee should be aware that Supreme Court decisions which have sustained a restriction on protected political speech under the intermediate scrutiny test have done so only in contexts where the regulations "do not foreclose an entire medium of expression, but merely shift the time, place or manner of its use, must leave open ample alternative channels for communication." *City of Ladue*, 512 U.S. at 56, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Current events demonstrate that foreclosing political speech through prerecorded calls may not leave political speakers with effective alternative means of communicating with voters.

Prerecorded political calls are being used extensively in connection with the forthcoming Iowa Caucuses. The reason for this is that the Caucuses are being held immediately after the critical Christmas/New Year shopping period. The major commercial advertisers, such as Wal-Mart and the automobile manufacturers, have long since purchased all available advertising spots on Iowa television and radio stations to promote their sales. Political candidates cannot obtain buy air time even though they have the necessary funding. Accordingly, they have relied to a substantial degree on prerecorded political calls, which have a demonstrated ability to reach identifiable potential voters in the days immediately before the contest and contribute to voter turnout. The candidates literally would have no effective alternative means of communication in this situation, if the governing law substantially restricted the ability of political speakers to reach potential voters through prerecorded political calls.

III. Preemption of Inconsistent State Laws.

Any new legislation that moves forward should include a provision clarifying the scope of the existing preemptive effect of the Telephone Consumer Protection Act with respect to State laws that are inconsistent with federal law or the FCC implementing rules with respect to interstate phone calls. The saving clause of that statute, 47 U.S.C. §227(e)(1), was intended to preserve the ability of the States that already had laws governing prerecorded calls to maintain in place, with respect to intrastate telephone calls, any restrictions that were more stringent than the new federal law and FCC rules that were to govern interstate calls.

Due to inartful drafting, the saving clause has no ascertainable plain meaning. All proposed readings have grammatical defects. This drafting error has made it difficult for reviewing courts to apply the provision. The law should be clarified to reflect the original intent of Congress. As the FCC correctly found in 2003, all State restrictions on interstate calls that differ from the federal rules should be preempted.

Thank you again for the opportunity to testify today. I would be please to respond to any questions that the Subcommittee may have.